

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ANDREW WILLIAM GARCIA,

Petitioner,

v.

CIVIL NO. 08-0047 MCA/DJS

ROBERT ULIBARRI, Warden,

Respondent.

ORDER

This matter comes before the Court on the proposed findings and recommended disposition of the United States Magistrate Judge (Docket No. 16). Petitioner filed objections to the proposed findings and recommended disposition (Docket No. 17) and the Court has made a *de novo* determination of the Magistrate Judge's proposed findings and recommended disposition.

As noted by the Magistrate Judge, Petitioner seeks to vacate the judgment and sentence entered following his conviction pursuant to a guilty plea of eleven counts of Criminal Sexual Penetration in the Second Degree (Child 13 to 16 Years Old)(Person in Position of Authority) and one count of Criminal Sexual Contact in the Third Degree (Person in Position of Authority). Petitioner was sentenced to a term of imprisonment of one hundred and two years, seventy-two years of which were ultimately suspended and he Petitioner challenges his conviction and sentence on the ground that his constitutional rights were violated when police questioned him after his arrest despite his request to speak with an attorney. The Magistrate Judge proposed to find that the instant petition is untimely pursuant to 28 U.S.C. §2244(d)(1) and also note that

Petitioner's claim could be found to be procedurally defaulted.

By his objections, Petitioner asserts that he has psychological problems dealing with complex issues and requests that the Court appoint counsel to represent him. Further, Petitioner reiterates the claim upon which he bases his request for *habeas* relief. Petitioner's objections do not establish the rare and exceptional circumstances required to qualify for equitable tolling, as they do not demonstrate he is actually innocent, nor do they show that he was prevented from timely pursuing relief. Cf. Burger v. Scott, 317 F.3d 1133, 1141 (10th Cir.2003). Accordingly,

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate Judge are adopted by the Court;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this action be, and hereby is, dismissed with prejudice.



4/29/09

HON. M. CHRISTINA ARMIÑO
UNITED STATES DISTRICT JUDGE